

4 Official Opinions of the Compliance Board 76 (2004)

MINUTES – CLOSED SESSION STATEMENT – INADEQUATE DESCRIPTION VIOLATED ACT – EXECUTIVE FUNCTION – PERSONNEL GRIEVANCE HEARING, HELD TO FALL WITHIN THE EXCLUSION – QUASI-JUDICIAL FUNCTION – PERSONNEL GRIEVANCE HEARING, IF SUBJECT TO CERTAIN JUDICIAL REVIEW PROVISION, HELD TO FALL WITHIN THE EXCLUSION – EXCEPTIONS PERMITTING CLOSED SESSIONS – COMPETITIVE DIGGING (§10-508(A)(14)) – DISPOSITION OF MUNICIPAL PROPERTY WITHOUT COMPETITIVE PROCESS, OUTSIDE THE EXCEPTION

September 22, 2004

Mr. Alan K. Thompson

The Open Meetings Compliance Board has considered your complaint that the governing body of the Town of Riverdale Park and its Public Works Committee committed multiple violations of the Open Meetings Act during the first six months of this year. The complaint included specific allegations suggesting either substantive or procedural violations of the Act and also raised a general question concerning the obligation to maintain minutes of certain meetings. The Honorable Guy Tiberio, the Mayor of Riverdale Park, submitted a timely response on behalf of himself and the Town Council.

We conclude that the Town violated the Open Meetings Act in several respects, although not with respect to the meetings of the Public Works Committee. We address below each allegation raised in the complaint, taking the liberty of reorganizing certain of the allegations in order to facilitate our review.

I

Documentation Following Closed Session Held January 26

A. Complaint and Response

The complaint alleged that the Council failed to provide adequate information about a closed meeting conducted on January 26, 2004, in the minutes of the Council's next open meeting (which was held on February 2). The complaint contended that the minutes failed to satisfy the disclosure requirement in

§ 10-509(c)(2) of the Act.¹ The minutes reported the closed session as follows: “For The Record: There was a closed meeting on January 26 regarding Personnel and Safety Issues.”

The Mayor responded that the minutes were sufficient to describe why the meeting was closed. The Mayor explained: “We do not believe we must name names, and [provide] a description of what type of personnel and safety issues were addressed. We realize some public members wish to have dates, times, names, & places, but in order to protect the identity of the individuals involved we have met our responsibility.” A copy of the relevant page of the Council’s February 2 minutes was included with the response.

B. Analysis

The Open Meetings Act requires that a public body provide certain minimal information to the public following a meeting closed under the Act through the minutes of a meeting which are publically available subsequent to the closed session. The Act provides:

If a public body meets in closed session, the minutes for its next open session shall include:

(i) a statement of the time, place, and purpose of the closed session;

(ii) a record of the vote of each member as to closing the session;

(iii) a citation of the authority under this subtitle for closing the session; and

(iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§ 10-509(c)(2). In applying this provision, we have repeatedly stated that the public record need not contain a level of detail that would defeat the desired confidentiality that lead to the closed session. *See, e.g., 3 Official Opinions of the Maryland Open*

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

Meetings Compliance Board 264, 270-71 (2003) (Opinion 03-4).² A meeting closed to discuss a specific personnel matter, for example, need not, in the Mayor's words, "name names." However, we have also repeatedly cautioned that simply parroting the applicable statutory justification for closing the meeting is inadequate. ³ *OMCB Opinions* at 270.

A public body must find a way to inform the public of the "topic of discussion" beyond the label "personnel matter." For example, the body might say (assuming this were the situation), "Consideration of disciplinary action for alleged violations of municipal policy." As this example indicates, there is a middle ground between identifying the individual whose personnel matter is involved, which is not required, and saying nothing more than the formulaic "personnel matter," which is impermissible.

In this case, the Council's reporting of the January 26 meeting in the minutes of the following session patently violated the Act. The Council's cryptic description gave no indication whatever of the nature of the personnel matter under consideration.

II

Public Works Committee

A. Complaint and Response

We combine the allegations in the complaint that deal with closed sessions of the Council's Public Works Committee conducted during June, 2004. The complaint alleged that the Committee violated the Act by failing to complete the written statement required under § 10-508(d)(2)(ii) in advance of the closed sessions and failed to provide sufficient detail in reporting the sessions at a Council meeting on July 6, 2004.³ In its response, the Mayor acknowledged that the Committee met twice during June for the purpose of hearing grievances filed by municipal employees. A copy of the Town's grievance procedures was included along with the

² For brevity's sake, we shall hereafter cite our opinion volumes as *OMCB Opinions*.

³ At the time that the complaint was filed, final minutes of the Council's July 6 meeting were not yet available. However, the Mayor included the relevant page of the minutes along with his response. The minutes reflected in pertinent part that "[t]he Public Works Committee met two times in closed executive session, for grievance hearings. There was not a Public Works Committee meeting."

Mayor's response. As part of this policy, the Committee acts as an employee grievance board.

The Mayor described the public notice provided in advance of these sessions and addressed the employees' interest in confidentiality in connection with such proceedings. The Mayor did not address whether the meeting was closed in accordance with the procedural mandates of the Act, including preparation of a written statement, but stated his belief that "the confidentiality and protection of the individual involved in a personnel matter requires less than waving the flag" and that "no further statements need to be made in these type hearings."

B. Analysis

We shall assume that the Committee's sessions were not closed as a personnel matter in accordance with the procedural requirements of the Act. Nevertheless, because of the nature of the grievance proceedings, we hold that the Act did not apply and, consequently, there was no violation.

The Public Works Committee is a public body for purposes of the Open Meetings Act. §10-502(h). It is established by local law. Furthermore, the Mayor acknowledged that the Committee conducted two meetings during the month of June. However, not every meeting of a public body is subject to the Act. §10-503. Although the information provided by the Mayor concerning the nature of the session is limited, we find it most unlikely that the Committee would consider changes in personnel policy during the course of an employee's grievance hearing. Generally, a grievance hearing involves the application of existing policy to a given set of facts. Based on the information provided, it is not clear whether judicial review could be sought under Title 7, Chapter 200 of the Maryland Rules following exhaustion of the administrative steps under the Town's grievance procedures. If so, the meetings conducted by the Committee appear to involve a quasi-judicial function, as defined by the Act. §10-502(i). If not, the meetings appear to involve an executive function. §10-502(d). In either case, the Open Meetings Act did not apply. §10-503(a)(1)(i) and (iii). Thus, no procedural or substantive violation of the Act occurred.

III

Propriety of June 21 Closed Session

A. Complaint and Response

Two of the allegations in the complaint addressed the propriety of the Council's closed session on June 21, 2004. The complaint assumed that the Mayor

informed the Council of a budgetary shortfall that motivated discussion of the sale of certain properties during the closed session and questioned whether discussion of a budgetary matter and potential sale or lease of municipal property could be addressed during a closed meeting. The complaint also questioned whether the justification for the closed session cited by the Council in advance of the meeting, §10-508(a)(14), provided adequate legal authority for the closed session. Citing Compliance Board Opinion 02-13, the complaint concluded that, “since the subjects discussed in this meeting did not deal with procurement, but instead *sale or lease* of Town property, the Town Council did not have authority to close the meeting.”

The Mayor disagreed that the closed meeting June 21 was illegal. The Mayor noted that final action in connection with the disposition of the property was taken in an open meeting. However, the Mayor indicated his belief that “negotiations and strategies to be used in the potential sale or lease of properties owned by the Town should be determined in a closed session so as not to tip [the Council’s] hand as to [the] bottom line option [the Council] may consider with potential tenants, lessees, or purchasers of Town owned properties.” As to the Council’s reliance on §10-508(a)(14), the Mayor noted that this provision, “while ambiguous, was the closest description [the Council] could use to discuss the objectives of the meeting as well as the various properties being considered and potential lessees or purchasers ...” Pointing out the need to close out the Town’s fiscal 2004 budget with a positive fund balance, the Mayor stated that “the Town could not afford the luxury of conducting leases or sales of property in a normal bidding process which could take 30-60 days.”

B. Analysis

We have limited knowledge about the scope of the closed session and what actually occurred during the Council’s meeting on June 21. Thus, we limit our discussion to what is clear from the record: that the Council’s relied on §10-508(a)(14) as the basis for closing the meeting to consider the sale or lease of municipal property through means other than a competitive bidding process.⁴ Under the heading “topics to be discussed,” the Council noted “negotiating terms regarding a potential contract for the sale/lease of certain properties owned by the Town.” Under “reason for closing,” the Council noted, “discuss possible strategies and conditions to be applied on contract due to date of June 30, 2004 end of fiscal year.”

⁴ In its response, the Mayor did not address the scope of discussion, if any, in connection with the budgetary issues. The Compliance Board lacks investigatory powers and cannot independently determine what occurred on June 21. *See, e.g., 3 OMCB Opinions* 140, 142 (2001) (Opinion 01-13) (analysis hindered by insufficient description of facts). The Open Meetings Act not only withholds investigatory power from the Compliance Board but also recognizes that, in consequence, the Compliance Board might be unable to resolve a complaint. §10-502.5(f)(2).

Section 10-508(a)(14) provides:

Subject to the provisions of [§10-508(d)], a public body may meet in closed session or adjourn an open session to a closed session only to:

...

(14) before a contract is awarded or bids are opened, discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

In applying this exception, like any other basis for closing a meeting under §10-508(a), we must give effect to the Legislature's mandate that the exception be "strictly construed in favor of open meetings." §10-508(c). And, as noted in the complaint, we previously opined that this provision was drafted to address "the particular situation of a public body's procurement of goods or services. ... This exception may not be expanded ... to encompass *any* contractual negotiation." 3 *OMCB Opinions* 233, 237 (2002) (Opinion 2-13). Furthermore, we note that the Act provides an independent basis for closing a meeting when a public body is evaluating the *acquisition* of real property. §10-508(a)(3). Had the General Assembly intended to provide an exception for *disposition* of real property, it could readily have incorporated it in §10-508(a)(3).

Nonetheless, we have never had occasion to consider whether the sale or other disposition of public property through a competitive process would fall under the ambit of §10-508(a)(14). Probably it would, because the competitive disposition of property, like competitive acquisition, appears to fit within the exception's reference to a public body's participation in a "competitive bidding or proposal process." We need not resolve that issue here, however, because the Mayor explicitly stated that time did not permit a competitive process concerning the disposition of these properties. Therefore, the Council's discussion in closed session on June 21 was beyond the scope of §10-508(a)(14).

The Mayor's response contained a telling phrase: §10-508(a)(14) "was the closest description we could use to discuss the objectives of the meeting" in closed session. In other words, the Council understandably felt that closed-session discussion was imperative to prevent potential buyers from thinking that they might get the property at fire-sale prices. The Council then looked around for the "closest" exception it could find.

But close doesn't count when a public body invokes one of the exceptions in §10-508(a). If the anticipated discussion is not within the exception – which must be narrowly construed – the meeting may not be closed on that basis.

IV

Reporting of June 21 Closed Session

The complaint alleged that the Council violated the Act by failing to report a closed meeting of the Council conducted June 21, 2004, in the minutes of the subsequent public session held on June 30. The minutes for the latter meeting were approved by the Council on July 6.

In its response, the Mayor acknowledged that the minutes of its June 30 meeting do not reflect the closed session that occurred June 21. Thus, we find that the Council violated §10-509(c)(2).

V

Miscellaneous

The letter filing the complaint raised a separate point, not as part of the complaint itself but as a request for guidance, about the Town's obligation to keep minutes of Council work sessions and meetings of various Town committees. In response, the Mayor conceded that minutes have not been kept for certain meetings.

In order to assist the Council in future compliance with the Act, we simply note that the Council is required to keep minutes of every meeting that is subject to the Act, regardless of whether the meeting is described as a work session rather than a formal meeting. Furthermore, any committee of the Council or other committee that meets the definition of a "public body" under §10-502(h) is required to keep minutes of a meeting that is subject to the Act. *See* §10-509. We encourage the Council to review the discussion concerning application of the Act and obligations concerning minutes in the *Open Meetings Act Manual* published by the Attorney General.⁵

⁵ Available at <http://www.oag.state.md.us/Opengov/openmtg.pdf>.

VI

Conclusion

The Compliance Board finds that the Riverdale Park Council violated the Open Meetings Act in its failure to properly report closed meetings conducted on January 26 and June 21, 2004, in the minutes of its subsequent public sessions. Closed meetings conducted by the Council's Public Works Committee during June 2004 involving grievance proceedings were not subject to the Open Meetings Act. Finally, the Council violated the Act when it conducted a closed meeting under §10-508(a)(14) on June 21, 2004, to consider the sale or lease of certain property.

OPEN MEETINGS COMPLIANCE BOARD

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